



STATE OF WASHINGTON
ENVIRONMENTAL HEARINGS OFFICE

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September 21, 2006

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RE: PCHB NO. 06-055 **DERUYTER BROTHERS DAIRY INC., SPRING CANYON
RANCH LLC, & SKYRIDGE FARMS v. ECOLOGY
PCHB NO. 06-057 COMMUNITY ASSOCIATION FOR RESTORATION OF
THE ENVIRONMENT (CARE) v. ECOLOGY**

Dear Parties:

Enclosed please find the Pre-Hearing Order from the conference held on September 20, 2006. Please review the order carefully in order to understand the details of what the process requires. For ease of reference, the key deadlines are as follows:

1. **Legal Issues:** Additional or revised legal issues due by **October 23, 2006**
2. **Discovery:** Discovery should be complete by **February 20, 2007**.
3. **Motions:** File motions on any issue that would be dispositive on or before **February 27, 2007**. Opposing parties shall file responses 14 days from the date received. Replies must be made within 10 days from receipt of the response.
4. **Joint Status Report:** shall be filed by **March 26, 2007**.
5. **Witness and Exhibit Lists:** Final witness and exhibit lists by **April 9, 2007**.
6. **Second Pre-Hearing Conference:** April 17 at 10:00 a.m. by telephone
7. **Briefs:** Pre-Hearing Briefs shall be filed by April 23, 2007.
8. **Hearing:** The hearing dates are set for **April 30, May 1-4 and May 7, 2007**

If you have questions, please do not hesitate to call

Sincerely yours,

Andrea McNamara Doyle, Presiding

AMD/jg/P06-057

Cc: Kevin Hancock, Ecology
Enc

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid to the parties of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED Sept 21, 2006, at Lacey, WA

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

DERUYTER BROTHERS DAIRY INC.,
SPRING CANYON RANCH LLC, &
SKYRIDGE FARMS,

Appellants,

PCHB No. 06-055

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PRE-HEARING ORDER

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE ENVIRONMENT
(CARE),

Appellant,

PCHB No. 06-057
(Consolidated)

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

On July 21, 2006, the Pollution Control Hearings Board (Board) received two appeals contesting the Concentrated Animal Feeding Operation (CAFO) National Pollution Discharge Elimination System (NPDES) and State Waste Discharge General Permit issued on June 21, 2006 by the Department of Ecology (Respondent). One appeal was filed by The Cow Palace¹; DeRuyter Brothers Dairy, Inc ; Spring Canyon Ranch, LLC; and Skyridge Farms (collectively

¹ On August 31, 2006, the Board issued an Order Granting Dismissal of the Cow Palace Only in response to its Notice of Voluntary Dismissal

1 the Dairies or Dairy Appellants), acting through their attorneys Lori A. Terry and Kathryn L.
2 Gerla, of Foster Pepper PLLC. The second appeal was filed by Community Association for
3 Restoration of the Environment (CARE), acting through the Western Environmental Law Center

4 A joint pre-hearing conference was held by telephone on September 20, 2006. Andrea
5 McNamara Doyle presided for the Board.

6 Appearances for the parties were as follows:

7 Appellants: Lori A. Terry and Kathryn L. Gerla, of Foster Pepper PLLC, on behalf of the
8 Dairy Appellants; Charlie Tebbutt of the Western Environmental Law Center, on behalf of
9 CARES.

10 Respondent: Ronald L. Lavigne, Assistant Attorney General, on behalf of Ecology.
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12 Based on the conference, the following Pre-Hearing Order is entered:
13

14 **I. CONSOLIDATION**

15 At the presiding officer's request, and with the agreement of the parties, the two above-
16 captioned matters are consolidated for hearing.
17

18 **II. HEARING**

19 The hearing in this matter will be held on **April 30, May 1-4, and May 7**. The hearing
20 will begin at **9:00 a.m. at the Board's offices in Lacey, Washington**. The secondary hearing
21 date of December 11-15, 2006, is cancelled by agreement of the parties. A **final pre-hearing**

1 **conference will be held on April 17 at 10:00 a.m** The presiding officer will initiate the pre-
2 hearing conference by telephone to the parties at the numbers on file with the Board unless
3 provided with a different number.

4 5 **III. MEDIATION AND SETTLEMENT**

6 The parties are encouraged to engage in mediation or settlement discussions with each
7 other at any time without the presence of the presiding officer, and to advise the Board at the
8 earliest convenience in the event settlement is reached. The parties were informed that the
9 Environmental Hearings Office offers no-cost mediation services. If the parties wish to use these
10 services, they may contact the Board for this to be arranged. Any telephonic request for these
11 services shall be followed-up with a written request to the presiding officer.

12 The parties agree to initiate settlement discussions on or before the conference call
13 scheduled between the parties' attorneys for **October 16, 2006, at 3:00 pm**.

14 The parties, through the Dairy Appellant's attorneys, shall file with the Board a joint
15 status report apprising the Board of settlement possibilities in the case by **March 26, 2007**.

16 17 **IV. LEGAL ISSUES**

18 The parties have agreed on the following statement of issues:

- 19 1. Did Ecology err by failing to include language in the combined State Waste
20 Discharge and NPDES General Permit to specify which permit conditions are
21 issued pursuant to state law and which portions are issued pursuant to the federal
Clean Water Act?

2. Did Ecology err by requiring, in Special Condition S3 D 2, an updated nutrient management plan if the permittee changes the field acres in the plan?
3. Did Ecology err by requiring, in Special Condition S4 B.1, permittees to report "as soon as possible" instead of within 24 hours?
4. Did Ecology err, under the federal Clean Water Act or Chapter 90.48 RCW, in its choice of sampling requirements contained in Special Conditions S4 C and S4.B.3 h?
5. Is the requirement in Special Condition S7 that a permittee demonstrate no remaining potential for discharge unlawful under the federal Clean Water Act or Chapter 90.48 RCW?
6. Did Ecology err by including General Condition G1 in duplication of other conditions in the permit?
7. Did Ecology err, under the federal Clean Water Act or Chapter 90.48 RCW, in applying General Condition G3 to dairy operations?
8. Does the permit unlawfully fail to provide public access to facility inspection, discharge, or records in violation of federal and state law?
9. Whether the permit violates the federal Clean Water Act, or Chapters 90.48 or 90.64 RCW, or their implementing regulations, by failing to require:
 - a. Regular monitoring upstream and downstream of permitted facilities; or
 - b. Monitoring immediately during discharge events at points of known discharges
10. Whether the permit contains adequate soil monitoring requirements to protect groundwater under Chapter 90.48 RCW.
11. Whether permit condition S3 A.3.b is so vague as to be unenforceable in violation of the federal Clean Water Act or Chapter 90.48 RCW.
12. Whether the permit fails to satisfy Washington law requiring the use of all known, available, and reasonable methods of preventing, controlling, and treating pollutants ("AKART") prior to discharge in violation of RCW 90.54.020(3)(b).
13. Whether section S3 D.1 of the permit is unlawfully vague regarding the time allowed to implement updated nutrient management plans.
14. Whether the permit's process for appealing individual applications for coverage under the general permit violates the federal Clean Water Act.

By **September 27, 2006**, the Dairies and CARE will exchange with each other and with Ecology, revisions of additional proposed legal issues as follows: CARE will propose revisions to issues No. 3, 5, and 6 contained in its Proposed Legal Issues filed with the Board on September 19, 2006, and the Dairies will propose revisions to issues B and I in its Statement of

1 Legal Issues also filed on September 19, 2006. After the parties' October 16, 2006 conference
2 call, but **not later than October 23, 2006**, the parties shall file with the Board any agreed-upon
3 revisions or additions to the above-listed legal issues and, if necessary, request an additional pre-
4 hearing conference with the presiding officer to resolve any remaining disputes over the
5 statement of legal issues

6 **V. DISCOVERY**

7 The parties will complete discovery by **February 20, 2007**, except for witnesses that may
8 be identified for the first time in the final witness list. These witnesses may be deposed after the
9 discovery cut-off date. If formal discovery is pursued, parties should pay particular attention to
10 the time requirements of the superior court civil rules with regard to interrogatories, depositions,
11 etc. Discovery requests shall be served sufficiently ahead of the discovery deadline so that the
12 opposing party has the response time allowed by these rules (for example, responses to
13 interrogatories are typically due thirty (30) days after service. See CR 33).

14 The parties shall endeavor to resolve any discovery disputes without involving the Board.
15 Any motions to compel discovery must be filed and served by the discovery cut-off date. An
16 original and **one (1) copy** of discovery motions and supporting documents must be filed with the
17 presiding officer. Any party filing a discovery motion shall also file a proposed order and shall
18 accompany such filing with an affidavit reciting efforts to resolve the discovery dispute.
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1 Depositions, interrogatories, requests for production or inspection, requests for admission
2 and the responses shall not be filed. It is the initiating party's responsibility to maintain the
3 original together with answers to interrogatories and to make them available for proceedings.

4 **VI. MOTIONS**

5 The Board normally decides motions exclusively on the parties' written submissions,
6 unless oral argument is held pursuant to WAC 371-08-450. At the parties' request, argument
7 may be held by telephone with the parties arranging the connections.

8 **Dispositive Motions.** Any motion regarding any issue that would be dispositive of all or
9 part of the case must be filed and served by **February 27, 2007**. The opposing party has
10 **fourteen (14) calendar days** from the date of receipt of the motion to file and serve a response.
11 A reply is due **ten (10) days** after receipt of the response. An **original and three (3) copies** of
12 all dispositive motion pleadings must be filed with the Board, and a copy must be served on the
13 opposing party. **All copies and attachments to briefs shall be three-hole punched.**

14 **Non-Dispositive Motions.** Responses to any non-dispositive motion must be filed and
15 served **five (5) days** from receipt of the motion by the non-moving party. The moving party then
16 has **three (3) days** from receipt of the response to file and serve a reply. An **original and one**
17 **(1) copy** of all non-dispositive motion pleadings must be filed with the Board, and a copy must
18 be served on the opposing party.

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VII. WITNESSES

The parties have exchanged preliminary lists of witnesses. Final lists of witnesses must be filed with the Board and served on the parties by **April 9, 2007**. A party wishing to call a witness listed by another party shall include that witness' name on its final witness list. The party calling a witness has the responsibility to ensure his or her attendance at the hearing.

A witness' expertise shall be established by résumé offered as an exhibit.

VIII. EXHIBITS

The parties have exchanged preliminary lists of exhibits. Final exhibit lists must be served on the parties and filed with the Board by **April 9, 2007**. The parties shall exchange copies of exhibits by **April 16, 2007**. After exchange of final exhibits, the parties are directed to confer in order to try and reach agreement on exhibits' authenticity and admissibility and to eliminate duplicate exhibits. Parties are asked to submit into evidence only those portions of voluminous documents actually being referred to or relied upon by a witness. Even though the parties may stipulate to the admissibility of exhibits, the exhibits generally should be offered through a witness at the hearing.

When meeting with the presiding officer on the first hearing day, each party shall have available for the Board an **original and three (3) copies** of its exhibits and exhibit lists. The exhibit lists shall identify those exhibits admissible by stipulation of the parties and include spaces for indicating whether each exhibit was offered, and admitted or excluded. An original or one (1) copy of any exhibit which cannot be conveniently copied due to size, bulk, reproduction difficulty, etc , must be available for the Board at the hearing

1 Each exhibit must be pre-marked and organized by tab for identification (A-1, A-2, etc ,
2 for Appellant and R-1, R-2, etc., for Respondent, respectively) and so identified on the exhibit
3 lists. The number given to an exhibit does not limit the order of its introduction at hearing. Any
4 exhibit listed by one party may be introduced by another party.

5 **The parties are strongly encouraged to confer and present uncontested, stipulated**
6 **facts to the Board prior to the hearing.**

7 **IX. BRIEFS**

8 Pre-hearing briefs are optional. If submitted, they must be filed and served no later than
9 **April 23, 2007.** An **original and three (3) copies** that are three-hole punched must be filed, and
10 a copy must also be served on the other parties or their attorneys.

11 Briefs are limited to **fifteen (15) pages** in length, absent an order granting a motion to
12 lengthen. If a citation is made to a case other than Wn. App. or Wn 2d, a complete copy of the
13 referenced citation must be provided with the brief, which will not count as part of the brief page
14 limitation.

15 **X. COMMUNICATION**

16 All correspondence and filings with the Board regarding this matter shall be sent to the
17 attention of the presiding officer with copies sent at the same time to all other parties.

18 Serving the party's representative any document required to be served on a party fulfills
19 the service upon the party requirement.

20 Telefax may be used to communicate with the Board and the parties, limited to **ten (10)**
21 **pages** in length, provided that the original is mailed the same day.

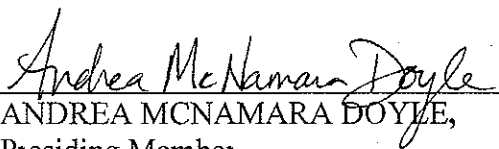
1 "Filed" means the date received by the Board

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3 **ORDER**

4 This order shall govern the proceedings, unless subsequently modified by order of
5 the Board for good cause upon a party's motion or the Board's volition.

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7 SO ORDERED this 21st day of September, 2006.

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9 **POLLUTION CONTROL HEARINGS BOARD**

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13 ANDREA MCNAMARA DOYLE,
Presiding Member